No. 11286

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellees.

Appellant Bruckman's Reply to Opening Brief for Cross-Appellant Harold Lloyd Corporation Upon Its Cross-Appeal.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases.

Statutes

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Statement.

Appellee and cross-appellant for convenience will be referred to as "plaintiff". Appellants and cross-appellees for convenience will be referred to as "defendants" or

"defendant Universal" or "defendant Bruckman", whichever may be appropriate.

Plaintiff in its opening brief upon its cross-appeal ignores settled principles of law on appeal, asks this Court to exceed its powers, and misinterprets well-settled rules of law or misapplies them.

Plaintiff first asks this Court to award general damages and to increase the special damages awarded by the trial court. By this novel request plaintiff suggests that this Court overthrow the findings of the trial court, which are based upon conflicting evidence, weigh the evidence, resolve the conflict, make new findings, and order a new and different judgment based thereon. (Op. Br. pp. 15-31.) Plaintiff cites no authorities to support its position, for the obvious reason that the authorities on the point are against plaintiff.

Secondly, plaintiff contends that the trial court erred in apportioning defendant Universal's profit to those attributable to the alleged infringing comedy sequence, and in failing to award plaintiff all of the profits in addition to awarding damages. To support this proposition plaintiff takes the position that a copyright infringer must respond in damages and account for profits. Plaintiff ignores controlling authorities, which hold that neither of plaintiff's contentions is maintainable.

Thirdly, plaintiff claims that it is entitled to statutory damages under the "in lieu" provision of Section 25(b) of the Copyright Act. Inasmuch as defendant Universal's profits were proved with certainty, and evidence was received on the issue of damages and the court awarded damages which exceeded defendant Universal's profits,

plaintiff's position under this point likewise flies in the face of controlling authorities. Besides, plaintiff cites no applicable authorities to support its claim.

Finally, plaintiff complains that the trial court sustained defendants' objections to its offer of proof.

The oral offer was too indefinite to rule upon. [Tr. Vol. II, pp. 367-368.] A written offer was filed after the trial court had lost jurisdiction of the case. It was filed after all parties had filed their notices of appeal. Leave to file the written offer was given on November 16, 1945, but it was not filed until March 7, 1946. Moreover, the evidence offered was cumulative besides being immaterial.

I.

Plaintiff's Position That This Court Should Assess General Damages De Novo and Reassess Special Damages Is Not Maintainable. Besides, the Trial Court Erred in Assessing Any Damages.

(a) In our brief on Bruckman's appeal we have shown that the trial court erred in assessing any damages at all. (Appellant Bruckman's Op. Br. pp. 28-34, 63-69. See, also, Op. Br. for Appellant Universal Pictures Company, Inc. pp. 53-68.)

In particular, we have shown that the trial court erred in assessing damages for the reason that the trial court refused to accept, in fact disregarded, the testimony of both plaintiff's and defendants' expert witnesses and made an arbitrary finding assessing damages at $40,000, which finding was based upon mere conjecture and unsupported by any substantial evidence. (Bruckman's Op. Br. p. 63.)

While it is true that the trial court may reject opinion evidence (*The S. C. L. No. 9,* 3 Cir. (1940), 114 F. (2d) 964, 968, it may not reject such evidence and then make an arbitrary finding of value based upon mere conjecture unsupported by any substantial evidence.

Emerald Oil Co. v. Commissioner of Internal Revenue, 10 Cir. (1934), 72 F. (2d) 681, 683;

Phipps v. Commissioner of Internal Revenue, 10 Cir. (1942), 127 F. (2d) 214, 217;

Diamond Alkali Co. v. Heiner, 3 Cir. (1932), 60 F. (2d) 505, 510.

(b) Plaintiff contends that this Court should assess general damages *de novo.* (Op. Br. pp. 15-19.) Plaintiff cites no authorities to support this strange and novel contention.

Assuming that the evidence was sufficient to support any finding of damages at all, it was conflicting, the credibility of the witnesses and the weight of the testimony were for the trial court, and it is submitted that this Court should not overthrow those findings, test the credibility of the witnesses, weigh the evidence, overthrow the findings of the trial court, and order the entry of a new and different judgment. To do so would be to fly in the face of such authorities as *United States v. State Street Trust Co.,* 1 Cir. (1942), 124 F. (2d) 948, 950-951; *Rothman v. Wilson,* 9 Cir. (1941), 121 F. (2d) 1000; and *Anglo California National Bank v. Lazard,* 9 Cir. (1939), 106 F. (2d) 693.

Besides, the issue of general damages was not presented to, or considered or passed upon by, the trial court, and the point therefore should not be considered by this Court.

Goldie v. Cox, 8 Cir. (1942), 130 F. (2d) 690, 715.

Plaintiff at the commencement of the trial announced, in answer to an inquiry by the court, that its proof on the issue of damages would be directed to the destruction of the value of the remake and reissue rights of plaintiff's motion picture "Movie Crazy". [Tr. Vol. I, p. 71.] Plaintiff was given full opportunity to present evidence on the issue of damages. As a matter of fact, the court continued the trial of the case from September 13, 1945, to November 16, 1945, to give the parties the right to produce more satisfactory proof on the issue of damages. [Tr. Vol. II, pp. 344-45.] Plaintiff took advantage of this opportunity, and called A. M. Botsford [Tr. Vol. II, pp. 453-470], and recalled Arthur M. Landeau [Tr. Vol. II, p. 400]. Plaintiff had its day in court on the issue of damages. Having failed to produce evidence sufficient to support a finding on damages, it should not now be permitted to further contest that question, or be given further opportunity to piece out defective proofs. That question should be considered closed. But if there be a reversal of the case, assuming that this Court holds there is liability, it is submitted that the most this Court should do is to direct the trial court to enter judgment for plaintiff against defendant Universal alone limited to the sum of $4,000.00, which represents 20% of the profits of defendant Universal.

Washingtonian Pub. Co., Inc. v. Pearson, C. A. Dist. Col. (1944), 140 F. (2d) 465, 467.

(c) Plaintiff next contends that this Court should re-examine the testimony of the experts on special damages called by both plaintiff and defendants, weigh their testimony, pass upon their credibility, overthrow the finding of the trial court, and then make a new finding reassessing damages and order the trial court to enter a new and different judgment based upon this Court's finding. (Op. Br. pp. 19-31.)

Again plaintiff cites no authority.

The controlling authorities on the question hold that plaintiff's position is not maintainable.

The rule is well settled that an appellate court will not disturb the findings of a trial court where the findings are based upon conflicting evidence.

> *United States v. State Street Trust Co.,* 1st Cir. (1942), 124 F. (2d) 948, 950-951.

In *The Bergen,* 9th Cir. (1933), 64 F. (2d) 877, this Court said:

> "* * * In any event, the conclusion to be drawn from the evidence on the question of notice was primarily for the trial judge, and, in view of the conflicting testimony, we are not at liberty to disturb his finding. As said by this court in The Mabel, 61 F. (2d) 537, 540: 'Even if we were inclined to differ with the learned trial judge who saw the witnesses, heard their testimony, and had opportunity of passing upon their credibility and accuracy, we would not be warranted in interfering with his findings of fact and conclusions, "unless the record discloses some plain error of fact, or unless there is a misapplication of some rule of law" ' [citing cases]. No such error or misapplication appears in the record." (P. 880.)

In *Muentzer v. Los Angeles Trust & Savings Bank,* 7th Cir. (1924), 3 F. (2d) 222, the Court announced the rule as follows:

> "While an examination of the record is necessary to determine whether the same is barren of all proof showing or tending to show liability on the part of defendants, we are not called upon to weigh conflicting evidence, nor substitute our conclusion for that of the trial judge.
>
> "The foregoing evidence justified the court in finding a ratification of Jenkins' action and we cannot disturb it." (P. 225.)

In *Dempsey v. Merritt, Chapman & Scott Corporation,* 2d Cir. (1926), 10 F. (2d) 687, the Court had this to say:

> "It is quite true that he says that in this instance he did consult the bargee and took his direction. Whether he should be believed, or the bargee, who contradicted him, we do not know; it is quite enough that Judge Campbell, who saw them both, chose to believe the bargee. We have said over and over that we will not re-examine such a finding." (P. 688.)

(d) Plaintiff next asserts: "C. The Prejudicial Attitude of the Trial Court Towards the Amount of Damages Sustained by Plaintiff." We are at a loss to understand what plaintiff means by this charge when read in the light of what plaintiff says in its brief under this heading, as follows:

> "Despite an honest, conscientious and intelligent approach to the problem of liability, from the commencement of the trial the District Judge manifested an inclination to discount and minimize any evidence

of moving picture production or distribution figures or which related to values or profits in the motion picture industry." (Op. Br. p. 29.)

"By quoting from the record—and the foregoing examples might be multiplied—we do not mean to charge the trial court with being arbitrary, capricious, or unreasonable. We feel that Judge Harrison attempted to reach what in his opinion was an honest and fair judgment." (Op. Br. pp. 30-31.)

The point, whatever it is, is not available to plaintiff because it was not made in either its Statement of Points on Appeal [Tr. Vol. II, pp. 542-543] or in its Specifications of Error. (Op. Br. pp. 5-6.)

C. C. A. 9, Rule 20.

Besides, the point ignores first principles.

Obviously the findings of the trial court cannot be overthrown.

As this Court said in *Stoody Co. v. Mills Alloys,* 9th Cir. (1933), 67 F. (2d) 807, 809:

"In this connection, we may observe that error is not assignable to the opinion of a court."

* * * * * * * *

"* * * These headings are practically new assignments of error, and are based upon what the trial court said in delivering its oral opinion. The opinion of the court was not the subject of exception or assignment of error. The reasons given in the opinion for the judgment of the court might be wrong, and still its judgment right. *It is what the court did, and not what it said, which is subject to exception and review.*"

II.

The Trial Court Had the Right to Apportion Profits, and Did Not Err in Refusing to Award Any Profits to Plaintiff.

(a) The profits which defendant Universal made from the production and exhibition of its motion picture "So's Your Uncle" were proved with certainty. For that matter, the amount of the profits were arrived at by a stipulation between plaintiff and defendants. [Tr. Vol. II, pp. 474-475.]

The trial court found that defendant Universal had benefited by the alleged infringement to the extent of twenty per cent, and no more, of the profits, namely, the sum of $4,100.00. [Tr. Vol. I, p. 36.] Plaintiff contends that there was no evidence upon which an apportionment of profits could be made. Plaintiff in making this contention ignores *Sheldon v. Metro-Goldwyn Pictures Corporation* (1940), 309 U. S. 390, 84 L. Ed. 825, and *Twentieth Century-Fox Film Corporation v. Stonesifer,* 9th Cir. (1944), 140 F. (2d) 579.

The trial court viewed plaintiff's motion picture "Movie Crazy," as well as defendant Universal's motion picture "So's Your Uncle." It could determine to what extent the comedy sequence contributed to the success of defendant Universal's said motion picture, what part the talents of the actors, the direction, the story, the scenery, the artistic conceptions, and the expert supervision contributed by defendants played in the creation of the profits.

This Court in *Twentieth Century-Fox Film Corporation v. Stonesifer, supra,* followed the *Sheldon* case, *supra,* and in affirming the trial court in the apportionment of profits in the *Stonesifer* case said:

> "It is now settled that where a portion of the profits of an infringing work is attributable to the appropriated work, to avoid an unjust course by giving the originator all profits where the infringer's labor and artistry have also to an extent contributed to the ultimate result, there may be a reasonable approximation and apportionment by the court of the profits derived therefrom." (140 F. (2d) at 584.)

At most, assuming our interpretation of *Sheldon v. Metro-Goldwyn Pictures Corporation, supra,* and *Twentieth Century-Fox Film Corporation v. Stonesifer, supra,* is not correct, this Court should refer the case to the trial court for the sole purpose of apportioning the profits.

(b) Plaintiff next contends that it is entitled to profits and damages. Plaintiff again ignores controlling authorities.

Sheldon v. Metro-Goldwyn Pictures Corporation, supra, holds that where profits are proved with certainty plaintiff is entitled to either profits or damages, whichever are the greater, but not to both profits and damages.

In *Sheldon v. Metro-Goldwyn Pictures Corporation, supra,* the Supreme Court, in dealing with the question, said:

> "In passing the Copyright Act, the apparent intention of Congress was to assimilate the remedy with respect to the recovery of profits to that already recognized in patent cases. Not only is there no suggestion that Congress intended that the award of

profits should be governed by a different principle in copyright cases but the contrary is clearly indicated by the committee reports on the bill. As to §25(b) the House Committee said:

> " 'Section 25 deals with the matter of civil remedies for infringement of a copyright. . . . The provision that the copyright proprietor may have such damages as well as the profits which the infringer shall have made is substantially the same provision found in §4921 of the Revised Statutes relating to remedies for the infringement of patents. The courts have usually construed that to mean that the owner of the patent might have one or the other, whichever was the greater.' " (309 U. S. 400, 81 L. Ed. 831.)

It is well settled that when the Supreme Court construes a statute, the construction placed by it upon the statute becomes an integral part of the statute.

The Supreme Court in *Gulf, Colorado and Santa Fe Railway Company v. Moser* (1927), 275 U. S. 133, 72 L. Ed. 200, said:

> "The interpretation approved by us has become an integral part of the statute. It should be accepted and followed." (275 U. S. 136, 72 L. Ed. 202.)

In *Jerome v. Twentieth Century-Fox Film Corporation* (D. C., S. D., N. Y., 1944), 58 Fed. Supp. 13, 15, it was held that a plaintiff in a copyright case was not entitled to both profits and damages.

The authorities cited by plaintiff in support of its contention all antedate the *Sheldon* case, *supra.*

III.

Profits Having Been Proved, Plaintiff Is Not Entitled to Statutory Damages.

(a) Plaintiff contends that it is entitled to statutory damages under the "in lieu" provision of Section 25 of the Copyright Act. Again, plaintiff ignores controlling authorities.

In *Sheldon v. Metro-Goldwyn Pictures Corporation, supra,* the Supreme Court said:

> "We agree with petitioners that the 'in lieu' clause is not applicable here, as the profits have been proved and the only question is as to their apportionment." (309 U. S. at 399, 84 L. Ed. at 830.)

The Circuit Court of Appeals for the First Circuit in *Sammons v. Colonial Press,* 1st Cir. (1942), 126 F. (2d) 341, 350, followed the *Sheldon* case, *supra,* and said:

> "However, if the district court finds after further hearing upon remand that Colonial Press made profits for which it must account, the amount of such profits will be the measure of recovery, and it will no longer be permissible to decree statutory damages 'in lieu of actual damages and profits.'"

The Court of Appeals for the District of Columbia in *Washingtonian Pub. Co. v. Pearson* (1944), 140 F. (2d) 465, following the *Sheldon* case, *supra,* in speaking of the "in lieu" provision of Section 25 of the Copyright Act, said:

> "It is not applicable here, first because there was no 'injury done' to appellant, and second because 'the profits have been proved.'" (P. 466.)

See, also:

Davilla v. Brunswick-Balke-Collender Co. of New York, 2d Cir. (1938), 94 F. (2d) 567.

IV.

The Trial Court Did Not Err in Sustaining Defendants' Objections to Plaintiff's Offer of Proof.

Plaintiff complains that the trial court erred in sustaining defendants' objections to its written offer of proof. It makes the point in its Specifications of Error relied upon (Op. Br. pp. 6-13), but does not argue the point and cites no authorities in support of the specification. Because no authorities are cited in support of the specification, and because the specification was not argued by plaintiff, this Court should ignore the specification. (C. C. A. 9, Rule 20.)

Besides, the point is not available to plaintiff because its offer of proof was filed too late.

On November 16, 1945, during the trial of the case, plaintiff's counsel was given permission to file a written offer of proof. [Tr. Vol. II, p. 466.]

On November 16, 1945, all parties rested, and the case was adjourned to December 17, 1945, for oral argument. [Tr. Vol. II, p. 490.] Up to that time plaintiff had not submitted its written offer of proof.

On December 17, 1945, the following occurred:

> "Mr. Fendler: I shall be very glad to restrict myself to matters which are not covered in my briefs. I shall not cite any additional authorities but I do wish to call a few matters to your Honor's attention. Also I think there is an offer of proof which your Honor directed be filed in writing.
>
> "The Court: That will be deemed filed. For the reasons heretofore stated, the evidence has been rejected." [Tr. Vol. II, p. 492.]

Conclusion.

Plaintiff's cross-appeal should be dismissed, and all relief asked for in its brief should be denied, for the reasons herein given.

Respectfully submitted,

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